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April 12, 2022

The Honorable Martin J. Walsh
Secretary
Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Secretary Walsh:

We write to ensure that the Department of Labor's (DOL) Wage and Hour Division (WHD) is providing proper guidance under the *Fair Labor Standards Act* (FLSA) for the estimated 18.9 million Americans who choose to be their own bosses as independent contractors.¹ Independent contractors are an important part of the American workforce, ensuring that the U.S. economy remains an engine of opportunity, growth, and prosperity. Workers who want the freedom and flexibility to support themselves and their families should not be denied the opportunity to set their own hours and pursue economic opportunities.

During the Trump administration, DOL published a final rule updating the standard for determining whether an individual is classified as an independent contractor or as an employee under the FLSA, providing workers and businesses with greater clarity and certainty.² The final rule adopted an economic realities test with an emphasis on a worker's level of control over his or her work and entrepreneurial opportunity for profit or loss. To provide guidance to workers and businesses about WHD's implementation of this rule, it published two opinion letters clarifying the conditions under which individuals are considered independent contractors when working as distributors of a manufacturer's food products and tractor-trailer truck drivers, respectively.³ These opinion letters—like all opinion letters published by WHD—help workers and businesses understand and comply with complex wage-and-hour laws.

¹ See Independent Contractor Status Under the FLSA, 86 Fed. Reg. 1168 (Jan. 7, 2021).

² *Id.*

³ WHD, OPINION LETTER SEARCH, FLSA2021-9 & FLSA2021-9, <https://www.dol.gov/agencies/whd/opinion-letters/search>.

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Within less than a week of taking office, the Biden administration demonstrated its open hostility to workers who choose to be independent contractors. On January 26, 2021, the Biden administration withdrew the two opinion letters.⁴ Furthermore, it hastily and unnecessarily attempted to delay and withdraw the Trump administration rule on the classification of independent contractors in May 2021 without providing workers and other stakeholders with sufficient opportunity to engage in the rulemaking process.⁵

WHD claimed the two opinion letters were “issued prematurely because they are based on rules that have not gone into effect.”⁶ However, on March 14, 2022, the U.S. District Court for the Eastern District of Texas overturned DOL’s May 2021 rule which would have withdrawn the Trump administration’s rule clarifying the classification of independent contractors and employees under the FLSA.⁷ As a result, the Trump administration rule is in effect.

Workers and businesses need guidance from WHD that accurately reflects federal policies. With the court’s reinstatement of the Trump administration rule, the two opinion letters on independent contractors noted above should also be reinstated. We request that WHD immediately re-publish these important opinion letters and re-post them on its website. If WHD will not do this, please provide a written explanation of why it will not no later than April 26, 2022.

Thank you for your attention to this important matter.

Sincerely,



Virginia Foxx
Ranking Member



Fred Keller
Ranking Member
Subcommittee on Workforce Protections

⁴ *Id.*

⁵ Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Withdrawal, 86 Fed. Reg. 24,303 (May 6, 2021).

⁶ OPINION LETTER SEARCH, *supra* note 3.

⁷ *Coalition for Workforce Innovation v. Walsh*, No. 21-cv-00130 (E.D. Tex. Mar. 14, 2022) (order granting plaintiffs’ motion for summary judgment).